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No. 00-1626

IN THE

Supreme Court of the United States

INDUSTRIVARDEN SERVICE AB,

Petitioner,

v.

CAROL CLUNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

JOHN W. COWDEN
Counsel of Record
THOMAS O. BAKER
TODD W. AMREIN
BAKER STERCHI COWDEN & RICE, LLC
2400 Pershing Road
Suite 500
Kansas City, Missouri 64108-2504
(816) 471-2121

Attorneys for Petitioner
Industrivarden Service AB

167423

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE

In 1972, Petitioner manufactured and sold the subject construction hoist F.O.B. Swedish port to an independent U.S. distributor, Esco Corporation ("Esco"), whose area of distribution included thirteen western states but did not include Missouri. Esco imported the subject hoist to the United States via Seattle, Washington. The subject hoist ultimately ended up in Missouri in 1996 through unknown channels and as a result of the unilateral activity of third persons beyond Petitioner's control. Respondents allege that defects in the subject hoist caused decedent's death when he fell from it in Missouri in 1996.

At the time of the sale of the subject hoist in 1972, Petitioner also sold construction hoists to one other independent U.S. distributor, B.M. Heede ("Heede"). Heede's area of distribution did include Missouri. The subject hoist was not sold to Heede, and there is no evidence that Heede had any contact with the subject hoist.

REASONS FOR GRANTING THE WRIT

A state may assert specific personal jurisdiction over a nonresident defendant only if "the defendant has 'purposefully directed' his activities at residents of the forum, **and** the litigation results from alleged injuries that **'arise out of or relate to'** those activities." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (citations omitted) (emphasis added). In other words, two elements must be satisfied before a court may find the "minimum contacts" necessary to confer specific personal jurisdiction over a defendant.

With respect to the second element of the test, some circuits use the "substantive relevance" test to determine whether a plaintiff's cause of action "arises out of or relates to" a defendant's contacts with the forum. Other circuits use the "but for" test in making this determination. Still other circuits, like the Eighth Circuit, have adopted neither of these tests and instead only address the "purposeful availment" element.

In recent years, this Court has grappled with the "purposeful availment" element of this test through its treatment of the "stream of commerce" theory of personal jurisdiction. The case at bar presents this Court with the rare opportunity to clearly define for all circuits when a cause of action can be said to "arise out of or relate to" a defendant's contacts with a forum. A great deal of constitutional weight rides on the interpretation and application of this phrase; indeed, the phrase defines the relationship between the forum state and the defendant necessary to exercise specific personal jurisdiction.

I.

THE EIGHTH CIRCUIT MISAPPLIED SPECIFIC JURISDICTION PRINCIPLES IN FINDING JURISDICTION OVER PETITIONER IN MISSOURI BECAUSE RESPONDENTS' CAUSE OF ACTION DID NOT "ARISE OUT OF OR RELATE TO" PETITIONER'S CONTACTS WITH MISSOURI.

Where a court seeks to assert specific jurisdiction over a nonresident defendant, the "minimum contacts" prong of the constitutional analysis is satisfied only if "the defendant has 'purposefully directed' his activities at residents of the

forum, **and** the litigation results from alleged injuries that **'arise out of or relate to'** those activities." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (citations omitted) (emphasis added). In the instant case, the Eighth Circuit majority found that Petitioner purposely availed itself of the privilege of conducting business in Missouri by using one or two United States distributors to distribute its products. *See Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000). (Pet. App. A at 12a).

However, the Eighth Circuit completely neglected the second prong of the test necessary for a finding of specific personal jurisdiction, *to wit*: Did Respondents' cause of action for wrongful death "arise out of or relate to" Petitioner's contacts with the State of Missouri? If the answer to this question is "no," then a Missouri court does not have specific personal jurisdiction over Petitioner. In addition, because Missouri courts do not have general personal jurisdiction over Petitioner (*see* Part II., *infra*), the case should be dismissed for lack of personal jurisdiction.

Respondents do not dispute the following chain of events: The allegedly defective construction hoist was manufactured in Sweden and sold F.O.B. Swedish port in 1972 to an independent U.S. distributor whose territory did not include Missouri. The subject hoist was imported into the United States by that distributor via Seattle, Washington, and the hoist, through unknown channels unrelated to Petitioner, made its way to Missouri, where decedent fell from it and died.

Under these facts and the "substantive relevance" test, Respondents' cause of action did not arise out of or relate to

Petitioner's contacts with Missouri. Any contacts that Petitioner may have had with Missouri were made through Heede, the distributor (and later subsidiary) whose distribution area encompassed the state of Missouri. Heede did not import the subject construction hoist. Esco, the other U.S. distributor used by Petitioner, imported the subject hoist. Esco's area of distribution did not include Missouri. Therefore, the contacts of Petitioner with Missouri, if any, were not substantively relevant to Respondents' cause of action, nor were they related to "the operative facts of the litigation." *See Rush v. Savchuk*, 444 U.S. 320, 329, 100 S. Ct. 571, 578, 62 L. Ed. 2d 516 (1980).

In their Opposition, Respondents, like the Eighth Circuit, point to the distribution system established by Petitioner to support specific personal jurisdiction over it in Missouri. (Opp. at 7). The Eighth Circuit found that by using a United States distributor whose territory included Missouri, Petitioner satisfied the "purposeful availment" element of the test. *Clune v. Alimak AB*, 233 F.3d at 544. (Pet. App. A at 11a-12a). This, however, does not end the inquiry. A court must also find that Respondents' cause of action "arises out of or relates to" Petitioner's contacts with the state of Missouri.

Respondents do not specifically address this question. Indeed, a careful reading of the cases cited by Respondents in support of their position is quite revealing. (Opp. at 8-9). While each case cited addresses the "purposeful availment" requirement of the "minimum contacts" analysis, not one of the cases addresses or even recognizes the "arising out of or related to" requirement. *See Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994); *Vandelune v.*

4B Elevator Components Unlimited, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998); *Bartow v. Extec Screens & Crushers, Ltd.*, 53 F. Supp. 2d 518 (D. Mass. 1999); *Vermeulen v. Renault, USA, Inc.*, 985 F.2d 1534 (11th Cir. 1993); *Giotis v. Appollo of the Ozarks*, 800 F.2d 660 (7th Cir.), *cert. denied*, 479 U.S. 1092 (1987); *Benn v. Linden Crane Co.*, 370 F. Supp. 1269 (E.D. Pa. 1973).

Respondents do not dispute the current split in the circuits in defining the scope of the phrase "arising out of or related to" for purposes of specific personal jurisdiction. Some circuits have adopted the "substantive relevance" test. (Pet. at 16). Others have adopted the "but for" test. (Pet. at 15).

Not surprisingly, the Eighth Circuit has adopted neither of these tests because it does not incorporate this element into its "minimum contacts" analysis. *See Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998). In reversing a district court decision, a recent Tenth Circuit opinion emphasized the importance of addressing both elements of the test:

> In finding that [defendant] had sufficient contacts with Wyoming to justify the assertion of personal jurisdiction, the district court considered only one branch of the specific jurisdiction test: the degree of purposeful availment reflected in the contacts of the defendant with the forum state. Although the district court gave extensive review to that issue,

> it did not address the second prong, which must be met before a court can properly exercise specific jurisdiction. The contacts must reflect purposeful availment *and* the cause of action must arise out of those contacts.

Kuenzle v. HTM Sport-Und Friezeitgerate AG, 102 F.3d 453, 456 (10th Cir. 1996) (emphasis in original).

The question concerning the proper interpretation and application of the phrase "arising out of or related to" in specific personal jurisdiction jurisprudence is dispositive of the jurisdictional issue presented here and is squarely before this Court for its determination.

II.

THE EIGHTH CIRCUIT DID NOT FIND PETITIONER SUBJECT TO THE GENERAL JURISDICTION OF MISSOURI COURTS IN THAT PETITIONER'S CONTACTS WITH MISSOURI WERE NOT "CONTINUOUS AND SYSTEMATIC" DURING THE RELEVANT TIME FRAME.

In their Opposition and contrary to a reasonable reading of the Eighth Circuit's decision, Respondents claim that the Eighth Circuit majority found Petitioner subject to the general personal jurisdiction of Missouri courts. (Opp. at 10). Of course, such a finding would obviate the need for this Court to reach the salient issue of whether Respondents' cause of action "arose out of or related to" Petitioner's Missouri contacts necessary for the exercise of specific personal jurisdiction.

In an attempt to support their assertion, Respondents cite a portion of a footnote in the majority opinion, which states that the record "contains evidence of continuous transactions between [Petitioner] and its United States distributors." *See Clune v. Alimak AB*, 233 F.3d at 545 n.9 (8th Cir. 2000). (Pet. App. A at 13a-14a). (Opp. at 10). This excerpt from the Eighth Circuit's opinion refers to contact between Petitioner and its distributors, **not** between Petitioner and Missouri.

Respondents also go on to cite another portion of the same footnote in support of its untenable position: "[Petitioner], at minimum, had constructive knowledge that its construction hoists would end up in Missouri. [Petitioner] knew that by 1986, 20 to 40 hoists were sold into the state. . . ." *Id.* (Pet. App. A at 14a). (Opp. at 10). The fact that twenty to forty of its construction hoists ended up in the State of Missouri between 1947 and 1986 does not constitute the "continuous and systematic" contacts necessary to confer general personal jurisdiction over Petitioner in Missouri courts. In fact, the Eighth Circuit recognized that twenty to forty hoists ending up in Missouri, when taken alone, may even fall short of "purposeful availment." *Id.* at 543-44. (Pet. App. A at 10a-11a).

Respondents also point to the activity of Petitioner's distributors (1960-1978) and subsidiary (1978-1988) in an attempt to show that Petitioner's contacts with Missouri were "continuous and systematic." (Opp. at 11-12). Indeed, Judge Bright's concurrence, which seems to base jurisdiction over Petitioner on general personal jurisdiction principles absent a finding of "continuous and systematic" contacts with Missouri and without any reference to the timing of the alleged contact, is based on the contacts of Petitioner's subsidiary with the state of Missouri. *Id.* at 546-47 (Bright, J., concurring). (Pet. App. A at 17a-19a).

While Petitioner does not believe the contacts of its independent distributors and/or wholly owned subsidiaries with the state of Missouri can be used to establish jurisdiction over it, *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634 (1925), even if such contacts are used, they are so antiquated as to be irrelevant. In general personal jurisdiction cases, courts will "examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances — **up to and including the date the suit was filed** — to examine whether they satisfy the 'continuous and systematic' standard." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-70 (2d Cir.), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996) (emphasis added).

Petitioner discontinued its manufacturing business in 1988. Respondents filed suit in December 1997. At least ten years passed without any Missouri contacts, let alone "continuous and systematic" contacts. No court has found that a ten-year or greater period of time prior to filing suit is an appropriate and reasonable time frame in which to measure a defendant's forum contacts for general personal jurisdiction purposes. (Pet. at 21). Moreover, even if this Court found a ten-year time period to be reasonable under the circumstances to assess Petitioner's contacts with Missouri, there is no evidence in the record to support a finding that Petitioner had "continuous and systematic" contacts with Missouri from 1988 to 1997.

Plaintiffs' cause of action did not "arise out of or relate to" Petitioner's contacts with Missouri. Petitioner's contacts with Missouri were not "continuous and systematic" at any time, much less during a reasonable period of time preceding

plaintiffs' filing of suit. Therefore, Missouri courts cannot exercise specific or general personal jurisdiction over Petitioner. As a result, Petitioner's contacts with the state of Missouri were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above and in its accompanying petition, Petitioner requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JOHN W. COWDEN
Counsel of Record
THOMAS O. BAKER
TODD W. AMREIN
BAKER STERCHI COWDEN & RICE, LLC
2400 Pershing Road
Suite 500
Kansas City, Missouri 64108-2504
(816) 471-2121

Attorneys for Petitioner
Industrivarden Service AB